Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES RICHARD BIBBEE,
Petitioner,

v.

H. N. "SONNY" SCOTT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTION PRESENTED

Was the petitioner denied due process of law in 1991 when the state jury found him guilty of a non-charged crime, Second Degree Murder, after being erroneously instructed that Second Degree Murder was a lesser included offense of the charged crime, First Degree Murder, when, under Oklahoma law, Second Degree Murder was removed as a lesser offense in 1976?

PARTIES TO THE PROCEEDINGS

Petitioner

James Richard Bibbee is an individual and has no corporate affiliations.

Respondent

H. N. "Sonny Scott.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

I. THE COURT SHOULD GRANT CERTIORARI TO EXAMINE THE IMPORTANT ISSUE OF WHETHER A PERSON'S DUE PROCESS RIGHTS ARE VIOLATED WHEN HE IS CONVICTED OF A CRIME FOR WHICH HE IS NOT CHARGED, AND ONE THAT IS NOT A LESSER INCLUDED OFFENSE OF THE CHARGED CRIME 4

CONCLUSION 13

APPENDIX

Appendix A
Court of Appeals Order and Judgment, 11/29/99 . . . . . 1a

Appendix B
District Court Order and Judgment, 10/21/98 . 11a

Appendix C
District Court Report and Recommendation, 9/15/98 . . . . . 15a

TABLE OF AUTHORITIES

FEDERAL CASES

Bouie v. Columbia,
378 U.S. 347, 84 S. Ct. 1697 (1977) 12

Cole v. Arkansas,
333 U.S. 196, 68 S. Ct. 514 (1948) 9, 10

Hopkins v. Reeves,
524 U.S. 88, 118 S. Ct. 1895 (1998) 6, 7

Jackson v. Virginia,
443 U.S. 307, 99 S. Ct. 2781 (1979) 9

Lynce v. Mathis,
-- U.S. --, 117 S. Ct. 891 (1997) 11

Miller v. Champion,
161 F.3d 1249 (10th Cir. 1998) 11

Stirone v. United States,
361 U.S. 212, 80 S. Ct. 270 (1960) 9-10

United States v. Colon-Munoz,
192 F.3d 210 (1st Cir. 1999) 12

United States v. Self,
2 F.3d 1071 (10th Cir. 1993) 8, 9

STATE CASES

Applegate v. State,
904 P.2d 130 (Okla.Crim.App. 1995) 12

Cochran v. State,
4 Okl.Cr. 379, 111 P. 974 (1910) 9

Davis v. State,
980 P.2d 1111 (Okla.Crim.App. 1999) 5

Ex parte Harris,
8 Okl.Cr. 397, 128 P. 156 (1912) 10

Henderson v. State,
18 Okl.Cr. 611, 197 P. 720 (1921) 10

Hughes v. State,
868 P.2d 730 (Okla.Crim.App. 1994) 12

Lambert v. State,
888 P.2d 494 (Okla.Crim.App. 1994) 11

Lewis v. State,
970 P.2d 1158 (Okla.Crim.App.1998) 6

Marks v. State,
69 Okl.Cr. 330, 102 P.2d 955 (1940) 10

Mooney v. State,
990 P.2d 875 (Okla.Crim.App. 1999) 5

Ogelsby v. State,
411 P.2d 974 (Okla.Crim.App. 1966) 10

Shrum v. State,
991 P.2d 1032 (Okla.Crim.App. 1999) 12

Tibbs v. State,
819 P.2d 1372 (Okla.Crim.App. 1991) 10

Turrentino v. State,
965 P.2d 955 (Okla.Crim.App. 1998) 13

Willingham v. State,
947 P.2d 1074 (Okla.Crim.App. 1997) . . . 4, 5, 6

FEDERAL STATUTES

28 U.S.C. § 1257(3) 1

U.S. Const. Amend. V 1

U.S. Const. Amend. XIV 1

U.S. Const. Art. 1, § 10 2

U.S. Const. Art. 1, § 9, cl. 3 11

STATE STATUTES

21 Okla. Stat. §701.7 2

21 Okla. Stat. §701.8 3

22 O.S. 1991, §916 9

MISCELLANEOUS

Charles Blair, Lesser Included Offenses in Oklahoma,
38 Okla. L. Rev. 697 (1985) 13

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Tenth Circuit Court of Appeals entered in this case on the 29th day of November, 1999.

OPINION BELOW

The Opinion of the Tenth Circuit Court of Appeals entered November 29, 1999 is unpublished and is attached to this Petition as Appendix "A". Petitioner did not petition the Tenth Circuit for rehearing. Attached as Appendix "B" is the Order and Judgment of Honorable Robin J. Cauthron, United States District Judge. Also attached, as Appendix "C", is the Report and Recommendation of United States Magistrate Judge, Gary M. Purcell.

JURISDICTION

The Judgment of the Tenth Court of Appeals was entered on November 29, 1999. Jurisdiction of this Court is imposed pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

U.S. Const. Amend. XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Art. 1, § 10.

No State shall . . . pass any Bill of Attainder, ex post facto law . . .

Title 21 Okla.Stat. §701.7. Murder in the First Degree

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from

lawful custody, first degree burglary or first degree arson.

Title 21 Okla. Stat. §701.8 Murder in the Second Degree

Homicide is murder in the second degree in the following cases:

1. When perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; or

2. When perpetrated by a person engaged in the commission of any felony other than the unlawful acts set out in Section 1. . .

STATEMENT OF THE CASE

James Richard Bibbee was charged in the District Court of Garfield County, State of Oklahoma with First Degree Murder. At trial, Mr. Bibbee maintained that he was acting in self-defense. The jury was instructed on the charged crime, as well as Second Degree Murder. Mr. Bibbee objected to the instruction on Second Degree Murder.

The Oklahoma jury found Mr. Bibbee guilty of Second Degree Murder. Thereafter, Mr. Bibbee appealed to the Oklahoma Court of Criminal Appeals. That court summarily affirmed the case. Subsequently, Mr. Bibbee then filed an application for state post-conviction relief. During the pendency of that application, the Oklahoma Court of Criminal

Appeals decided *Willingham v. State*, 947 P.2d 1074, 1080-82 (Okla.Crim.App. 1997), a case which held that Second Degree Murder had not been a lesser included offense of First Degree Murder in Oklahoma since 1976. Mr. Bibbee attempted to amend his post-conviction application, however, the Oklahoma Court of Criminal Appeals affirmed the district court's denial of post-conviction relief and denied permission to amend.

Subsequently, Mr. Bibbee sought habeas corpus relief in the United States District Court for the Western District of Oklahoma. The District Court denied relief, but granted a certificate of appealability. The Tenth Circuit affirmed the denial of relief in an unpublished opinion. Mr. Bibbee now petitions this Court to grant a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO EXAMINE THE IMPORTANT ISSUE OF WHETHER A PERSON'S DUE PROCESS RIGHTS ARE VIOLATED WHEN HE IS CONVICTED OF A CRIME FOR WHICH HE IS NOT CHARGED, AND ONE THAT IS NOT A LESSER INCLUDED OFFENSE OF THE CHARGED CRIME.

Mr. Bibbee was charged with First Degree Murder in Oklahoma state court. He was convicted of Second Degree Murder and sentenced to life imprisonment. The state trial court had instructed the jury on the charged crime and also

instructed the jury on what the trial court thought was a lesser included offense. However, the trial court's interpretation was incorrect. Second Degree Murder, at that time, was not a lesser included offense under Oklahoma law. This Court should grant certiorari to determine whether Mr. Bibbee is being imprisoned in violation of Due Process.

In *Willingham v. State*, 947 P.2d 1074 (Okla. Crim. App. 1997), the Oklahoma Court of Criminal Appeals said that Second Degree Murder had not been a lesser included offense of First Degree Murder since 1976:

> Under the earlier versions of our second degree murder statute, cited above, second degree murder was a lesser included offense of first degree murder. *See* 21 O.S. 1973, [Section] 701.2 (Homicide is murder in the second degree when perpetrated with premeditation, but by an act not enumerated in the first degree section). However, when our murder statutes were amended in 1976, second degree "depraved mind" murder was no longer a lesser included offense of first degree "malice" murder. Apparently, our case law failed to recognize this change in the statutes.

947 P.2d at 1074.

The Oklahoma Court of Criminal Appeals subsequently reaffirmed that Second Degree Murder was not a lesser offense of First Degree Murder. *See Mooney v. State*, 990 P.2d 875, 886 (Okla. Crim. App. 1999); *Davis v. State*, 980 P.2d 1111 (Okla. Crim. App. 1999) (Lumpkin, V.P.J., concur in result) ("As to the lesser included offenses, the Court fails to recognize this Court has unequivocably held

that second degree murder is not a lesser included offense of first degree malice murder) (citing *Willingham*).

Mr. Bibbee was convicted of a crime for which he was never charged. He was convicted of a crime that was not a lesser included offense of the charged crime. *See Lewis v. State*, 970 P.2d 1158,1165-66 (Okla. Crim. App.1998) ("Appellant initially characterizes second degree murder and first degree manslaughter as lesser included offenses of first degree malice aforethought murder. Recently, this Court reaffirmed that 'an offense is lesser included only where the greater offense cannot be committed without necessarily committing the lesser.' *Willingham v. State* [citation omitted], quoting *State v. Uriarite*, 1991 OK CR 80, 815 P.2d 193, 195. In *Willingham*, this Court applied the test and noted that second degree depraved mind murder is not a lesser included offense of first degree malice murder").

The situation here approved by the lower federal courts departs from this Court's reasoning in *Hopkins v. Reeves*, 524 U.S. 88, 118 S.Ct. 1895 (1998). There, this Court held that state trial courts are not required to instruct juries on offenses that are not lesser-included offenses of the charged crime under state law.

Justice Scalia wrote the opinion for the Court in *Hopkins v. Reeves*. He set forth the following summation of the relevant Nebraska law in that case. Importantly, that analysis is applicable here to show that the present decision does not satisfy the requirements set forth by this Court. Justice Scalia wrote:

> In Nebraska, instructions on offenses that have been determined to be lesser included offenses of the charged crime are available to

> defendants when the evidence supports them, in capital and noncapital cases alike. Respondent's proposed instructions were refused because the Nebraska Supreme Court has held for over 100 years, both in capital and noncapital cases, that second-degree murder and manslaughter are not lesser included offenses of felony murder. [citations omitted] If a Nebraska trial court gives instructions on those offenses, and the defendant is convicted only of second degree murder or manslaughter, that conviction must be reversed on appeal. *See Thompson v. State, supra*, at 396, 184 N.W., at 68. Thus, *as a matter of law*, Nebraska prosecutors cannot obtain convictions for second-degree murder or manslaughter in felony murder trial.

118 S.Ct. at 1900 (footnote omitted) (emphasis in original).

Here, the Tenth Circuit rejected Mr. Bibbee's request for habeas corpus relief, arguing that he had some sort of constructive notice that he could also be charged with second degree murder. The Tenth Circuit fails to consider the analysis set forth in *Hopkins*:

> Moreover, respondent's proposed instructions would have introduced another kind of distortion at trial. Nebraska proceeded against respondent only on a theory of felony murder, a crime that under State law has no lesser included homicide offenses. The State therefore assumed the obligation of proving only that crime, as well as any lesser included offenses that existed under State law and were

> supported by the evidence; its entire case focused solely on that obligation. To allow respondent to be convicted of homicide offenses that are *not* lesser included offenses of felony murder, therefore, would be to allow the jury to find beyond a reasonable doubt elements that the State had not attempted to prove and indeed that it had ignored during the course of the trial. This can hardly be said to be a reliable result: "Where no lesser included offense instruction exists, a lesser included offense instruction detracts from rather than enhances the rationality of the process." *Spanziano v. Florida, supra*, at 455, 104 S.Ct., at 3159.

118 S.Ct. at 1903 (emphasis in original).

The failure of the Tenth Circuit to grant habeas corpus relief and direct that Mr. Bibbee's conviction be vacated is in conflict with a ruling from that court in another case. In *United States v. Self*, 2 F.3d 1071 (10th Cir. 1993), the Tenth Circuit reversed a conviction due to an improper theory of conviction:

> Because the jury was erroneously instructed on the question of whether the natural gas condensate was hazardous waste, this is not the case where we can "assume that jurors . . . reject[ed] the 'factually inadequate theory.'" *Pace*, 981 F.2d at 1130 [additional citations omitted] . . . [T]his is the case in which "a particular theory of conviction . . . is contrary to law." *Griffin*, -- U.S. at --, 112 S.Ct. at 474. Therefore, Defendant's count 1

> conspiracy conviction must be reversed. [citations omitted]

2 F.3d at 1092.

In *Self*, the Tenth Circuit, citing to the writings of Justice Scalia, said, "Jurors are not generally equipped to determine a particular legal theory of conviction submitted to them is contrary to law -- whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime." 2 F.3d at 1092. Here, the jury was not equipped to determine that Second Degree Murder was not applicable under Oklahoma law.

Oklahoma law provides that a jury may only convict an accused of an offense which is "necessarily included" within the charged crime. *See* 22 O.S. 1991, §916. At the time of Mr. Bibbee's trial, Second Degree Murder was not a lesser included offense of the charged crime of First Degree Murder. Thus, the conviction, as it stands, is a violation of Due Process. *See Cochran v. State*, 4 Okl.Cr. 379, 111 P. 974, 975 (1910) (Because the offense of riot is not necessarily included in that of robbery, a defendant charged only with robbery cannot lawfully be convicted of riot)

This Court should grant certiorari to clarify the Due Process principle that a conviction obtained on a charge not made violates a defendant's right to notice of the charge against and to Due Process of Law. "It is axiomatic that a conviction on a charge not made or upon a charge not tried constitutes a denial of due process." *Jackson v. Virginia*, 443 U.S. 307, 314, 99 S.Ct. 2781, 2786 (1979). *See also Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517 (1948); *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270 (1960).

In *Cole v. Arkansas*, Justice Hugo Black, writing for the Court, addressed the question, "Were the petitioners denied due process of law in violation of the Fourteenth Amendment by the circumstances that their convictions were affirmed under a statute of which they had not been charged?" 333 U.S. at 197, 68 S.Ct. at 515. Justice Black wrote, "It is as much a violation of due process to send an accused to prison following conviction on which he was never tried as it would be to convict him upon a charge that was never made." *Id.* at 201, 68 S.Ct. at 517. Here, the Second Degree Murder charge was never made. The Tenth Circuit's failure to grant relief is contra to long standing Supreme Court principle.

The failure of the state court to correct the problem is in conflict with opinions of that court. In *Tibbs v. State*, 819 P.2d 1372, 1375 (Okla. Crim. App. 1991), the Oklahoma Court of Criminal Appeals held that the defendant was denied due process of law where the trial court instructed on alternative theories of premeditated murder and felony murder but the Information failed to allege one of two alternative felonies used to support the felony-murder theory. *See also Ogelsby v. State*, 411 P.2d 974 (Okla. Crim. App. 1966) (reversing kidnapping charge under 22 O.S. [Section] 741, where defendant was charged with kidnapping under Section 745); *Marks v. State*, 69 Okl.Cr. 330, 102 P.2d 955 (1940) (last-minute amendment to the Information led to a change of the charge from Larceny from a Person to Robbery requiring reversal); *Ex parte Harris*, 8 Okl.Cr. 397, 128 P. 156. 157-58 (1912) (an indictment for Larceny does not include the crime of knowingly receiving stolen goods); *Henderson v. State*, 18 Okl.Cr. 611, 197 P. 720 (1921) (Rape conviction reversed where defendant was charged under one section of the statute, but convicted under another).

Another case which shows how the current case is in conflict with other cases from the same jurisdiction is *Lambert v. State*, 888 P.2d 494 (Okla. Crim. App. 1994). There, the State changed its theory of the case after the defendant testified. In *Lambert*, the State charged the defendant with first-degree premeditated murder, robbery, kidnapping and other sundry crimes. After the State rested its case, the defendant took the stand and testified to committing the robbery and the kidnapping. He claimed that he never intended to kill anyone, and that the fire which ultimately killed the victims was set by his co-defendant over his objection. In response to this evidence, the State sought and received an instruction on First Degree Felony Murder. Thus, the State was allowed to change its theory of culpability -- and seek conviction for a different crime -- after all the evidence had been presented. This is exactly what occurred in Mr. Bibbee's case -- the State was allowed to present an option on the theory of culpability after all the evidence had been presented. On appeal, the Court of Criminal Appeals reversed the murder conviction, finding that the defendant had been denied notice of the charges against which he had to defend. *Cf. Miller v. Champion*, 161 F.3d 1249, 1254 (10th Cir. 1998), citing *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253 (1976).

At the time of Mr. Bibbee's trial, Second Degree Murder was not a lesser included offense of First Degree Murder under Oklahoma law. Accordingly, the Tenth Circuit's approval of a lesser included offense amounts to a violation of the Constitution's prohibition of ex post facto laws. *See* U.S. Const. Art. 1, § 9, cl. 3 and *Lynce v. Mathis*, -- U.S. --, 117 S.Ct. 891 (1997) (To fall within *ex post facto* prohibition, law must be retrospective -- that is, it must apply to events occurring before its enactment -- and it must disadvantage offender affected by it by *altering definition of*

criminal conduct or increasing punishment for crime). *See also Applegate v. State*, 904 P.2d 130, 134 (Okla. Crim. App. 1995).

Subsequent to this case, the Oklahoma Court of Criminal Appeals has decided *Shrum v. State*, 991 P.2d 1032 (Okla. Crim. App. 1999), which now says that Second Degree Murder is a lesser included offense. Application of the *Shrum* case to this case would amount to a violation of the Ex Post Facto Clause of the Constitution. *See United States v. Colon-Munoz*, 192 F.3d 210 (1st Cir. 1999) (Application of forfeiture of farm on basis of conspiracy charge violated *ex post facto* clause). The Court of Criminal Appeals in *Hughes v. State*, 868 P.2d 730 (Okla. Crim. App. 1994) cited this Court decision in *Bouie v. Columbia*, 378 U.S. 347, 353-54, 84 S.Ct. 1697, 1702-03 (1977) and said:

> With respect to judicial interpretation of a criminal statute, the Court further held that:
>
> an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, [Section]10 of the Constitution forbids. An ex post facto law has been defined by this Court as one 'that makes an action done before passing of the law, and which was innocent when done, criminal; and punishes such action,' or that 'aggravates a crime or makes it greater than it was, when committed.'

868 P.2d at 735.

Here, Mr. Bibbee was not subject to prosecution for Second Degree Murder merely because he was charged with

First Degree Murder. At the time of his trial, it was improper to allow the jury to consider Second Degree Murder as a lesser charge. This Court should grant certiorari and determine if the giving of a improper lesser included offense instruction which allows a defendant to be convicted of a non-applicable crime amounts to a violation of Due Process of Law.

The law of lesser included offenses has been called a "many-headed hydra." Charles Blair, *Lesser Included Offenses in Oklahoma*, 38 Okla.L.Rev. 697 (1985). This Court should grant certiorari in order to set straight the concepts of Due Process and lesser included offenses. Here, the jury was instructed that the could not consider the offense of Second Degree Murder until they had decided the charge of First Degree Murder. Accordingly, Mr. Bibbee was acquitted on that charge. *Turrentino v. State*, 965 P.2d 955, 968 (Okla. Crim. App. 1998). This Court should grant certiorari in order to prevent Mr. Bibbee from spending the rest of his life in prison on a crime for which he was never charged.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari will be granted.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed November 29, 1999]

No. 98-6445
(D.C. No. CV-98-378-C)

JAMES RICHARD BIBBEE,
Petitioner-Appellant,

v.

H. N. SCOTT,
Respondent-Appellee.

ORDER AND JUDGMENT*

Before **EBEL, LUCERO**, and **MURPHY**, Circuit Judges.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34. 1(G). The case is therefore ordered submitted without oral argument.

James Richard Bibbee, an Oklahoma state prisoner, appeals the district court's dismissal of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He raises one issue: whether his due process rights were violated when he was charged with first-degree malice murder, but convicted of second-degree depraved mind murder. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

BACKGROUND

In July 1991, Bibbee, "who had been drinking and was perhaps enraged by a homosexual advance, beat the victim with his fists, kicked him with his boots, and jumped on him, knocking him out," Appellant's Br. at 10, and left him by the side of the road, see Appellant's App., doc. 7 at 7. The beating caused the victim's death. The State filed an information charging Bibbee with first-degree malice murder.[1]

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[1] The information is not in the record on appeal, and it is unclear whether it was included in the district court record. The parties both state that Bibbee was charged with first-degree murder. Bibbee states that the preliminary information charged defendant with "Murder in the First Degree and that crime's lesser included offenses." Appellant's App., doc. 8 at 4 (petitioner's memorandum brief filed in federal district court).

At trial, Bibbee maintained that he was acting in self-defense. In addition, he presented the testimony of a psychologist that, as a teenager, Bibbee had been the victim of a homosexual assault and any similar incident would trigger a quick response from Bibbee. The jury was instructed on first-degree malice murder, second-degree depraved mind murder, and first-degree heat of passion manslaughter. Counsel for Bibbee objected to the second-degree murder instruction, arguing that the evidence did not support it, and proposed an instruction on second-degree manslaughter (culpable negligence).

The jury found Bibbee guilty of second-degree murder. The Oklahoma Court of Criminal Appeals upheld the conviction in a summary disposition of his direct appeal. Subsequently, the state trial court denied Bibbee's counseled application for post-conviction relief. While the appeal of that order was pending, the Oklahoma Court of Criminal Appeals issued Willingham v. State, 947 P.2d 1074, 1080-82 (Okla. Crim. App. 1997), cert. denied, 118 S. Ct. 2329 (1998), which held that, under the Oklahoma murder statutes, second-degree depraved mind murder is not a lesser-included offense of first-degree malice murder. Bibbee then attempted to add an argument about the second-degree murder instruction to his post-conviction appeal. The Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief and denied permission to amend, stay, or remand.

Bibbee then filed a petition for habeas corpus in the federal district court, arguing that, under Oklahoma law, the state trial court lacked jurisdiction to try him for second-degree murder because that offense was not charged in the information and the lack of jurisdiction amounted to a due

process violation. The district court determined that "[e]ven assuming federal rights are implicated, if state law permits the jury's consideration of other forms of homicide, no due process right has been violated." Appellant's App., doc. 6 at 2. The court concluded that the instruction and conviction were not contrary to state law, and, therefore, there was "no error, constitutional or otherwise." Id. A grant of certificate of appealability and this appeal followed.

DISCUSSION

Bibbee filed his habeas petition after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under the standards of AEDPA, a habeas claim may be granted only if state court proceedings:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). See also Hooks v. Ward, 184 F.3d 1206, 1213 (10th Cir. 1999).

There are two strands to Bibbee's claim that he was denied his federal constitutional right to due process of law:

(1) the trial court lacked jurisdiction to subject him to a second-degree murder instruction; and (2) he had received no notice that he would be subjected to a second-degree murder instruction. Both strands are tied to the Willingham holding.

In Willingham, a defendant convicted of first-degree malice murder claimed that the district court had committed error by refusing "to instruct the jury on the offense of second degree depraved mind murder as a 'lesser included' offense." Willingham, 947 P.2d at 1079-80. After an examination and interpretation of the Oklahoma murder statutes, the Oklahoma Court of Criminal Appeals rejected this claim.

For an offense to be a lesser-included offense of a parent offense, the elements of the prospective lesser-included offense must be a subset of those contained in the parent offense. See Schmuck v. United States, 489 U.S. 705, 716 (1989). In Oklahoma, first-degree malice murder "requires an intent to kill, regardless of the means used." Willingham, 947 P.2d at 1081.[2] As of 1976, when a statutory revision became effective, "[s]econd degree murder requires that the defendant act with imminently dangerous conduct." Id.[3] The

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[2] The elements of first-degree malice murder are: "(1) unlawful (2) death of a human (3) caused by another (4) with malice aforethought." Willingham, 947 P.2d at 1081 (citing Okla. Stat. tit. 21, § 701.7(A) (1995 Supp.))

[3] The elements of second-degree "depraved mind" murder are: "(1) death of a human; (2) caused by conduct which was imminently dangerous to another person; (3) the conduct was that of the defendant; (4) the conduct evinced a depraved mind in extreme disregard of human life; [and] (5) the conduct was not

court conceived of "circumstances that first degree malice murder can occur without the use of imminently dangerous conduct." Id. It concluded, therefore, that "second degree depraved mind murder is not necessarily included in a charge of first degree malice murder." Id.

Although the relevant statutory change occurred in 1976, the case law "[a]pparently . . . failed to recognize" the consequences. Id. Accordingly, at the time of Bibbee's trial, Oklahoma courts treated second-degree depraved mind murder as a lesser-included offense of first-degree malice murder. See Hooks, 184 F.3d at 1233 n.25 (explaining the effect of Willingham); Boyd v. Ward, 179 F.3d 904, 916 (10th Cir. 1999) (same).

A. Lack of trial court jurisdiction

Bibbee argues that the procedure followed in his case violated a "fundamental procedural framework of Oklahoma jurisprudence, an action which is itself a violation of the Fifth and Fourteenth Amendments' core rights of due process." Appellant's Br. at 14. The theory is that, in the absence of a filed information alleging the essential elements of second-degree murder, the trial court lacked jurisdiction to try him for that crime.

Bibbee has identified inconsistencies in law and procedure. At the time of his trial, Oklahoma courts had

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done with the intention of taking the life of any particular individual." Willingham, 947 P.2d at 1081; Okla. Stat. tit. 21, § 701.8.

consistently held that an information setting out the critical elements of the charged offense is the means by which the trial court is vested with jurisdiction. See Miller v. State, 827 P.2d 875, 879 (Okla. Crim. App. 1992) (holding that a failure to allege every material element of a crime was fatal to jurisdiction), overruled by Parker v. State, 917 P.2d 980 (Okla. Crim. App. 1996) (holding that "a trial court's jurisdiction is triggered by the filing of an information alleging the commission of a public offense with appropriate venue" and that "any failure to allege facts constituting the offense . . . does not affect the trial court's jurisdiction."). Bibbee's jurisdictional argument is an arguable application of the Willingham holding and the Miller rule.

On federal habeas review, however,

> we are not empowered to correct all errors of state law. See Jackson v. Shanks, 143 F.3d 1313, 1317 (10th Cir. 1998). "[W]e may grant habeas relief to a state prisoner only if state court error deprived him of fundamental rights guaranteed by the Constitution of the United States." Id. (citation and internal quotation omitted).

Johnson v. Gibson, 169 F.3d 1239, 1252 (10th Cir.), cert denied, No. 99-5964, 1999 WL 688740 (U.S. Nov. 1, 1999). "Insofar as petitioner challenges the adequacy of the information under Oklahoma law, this is a question of state law." Id. It is therefore necessary to turn to the second strand of Bibbee's appellate argument to determine whether he has stated a valid habeas claim.

B. Lack of adequate notice

It is a basic principle of procedural due process "that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." Cole v. Arkansas, 333 U.S. 196, 201 (1948); see also Combs v. Tennessee, 530 F.2d 695, 698 (6th Cir. 1976) (requiring notice with "[s]uch definiteness and certainty . . . as will enable a presumptively innocent man to prepare for trial").

"In order to determine whether a defendant has received constitutionally adequate notice, the court looks first to the information." Calderon v. Prunty, 59 F.3d 1005, 1009 (9th Cir. 1995). "A charging instrument may violate the Sixth Amendment by failing to provide a defendant with adequate notice of the nature and cause of the accusations filed against him." Johnson, 169 F.3d at 1252. A variance between the evidence adduced at trial and the facts alleged in an information is reversible error "if the defendant is prejudiced in his defense because he cannot anticipate from the [information] what evidence will be presented against him. . . ." Rogers v. Gibson, 173 F.3d 1278, 1287 (10th Cir. 1999) (quotations and citation omitted).

It is generally accepted that a defendant has sufficient notice of an offense included within an indictment charging a more aggravated degree of that offense. See Fransaw v. Lynaugh, 810 F.2d 518, 529 (5th Cir. 1987); see also Salinas v. United States, 277 F.2d 914, 918 (9th Cir. 1960) (holding that first-degree arson charge for burning a dwelling house provides notice of charge of second-degree arson for burning

a structure). "'[I]t is inconceivable that in preparing a defense against [the greater charge, the defendant] was precluded from adequately defending himself against . . . a lesser included offense." United States v. Cova, 755 F.2d 595,599 (7th Cir. 1985), overruled on other grounds by United States v. Schmuck, 840 F.2d 384 (7th Cir. 1988), aff'd, 489 U.S. 705 (1989).

At the time of trial, Oklahoma courts treated second-degree depraved mind murder as a lesser-included offense of first-degree malice murder. See Hooks, 184 F.3d at 1233 n.25 (declining to consider the State's Willingham argument because the decision post-dated petitioner's trial by over eight years). Additionally, Oklahoma law required the district court "to instruct the jury on every degree of homicide which the evidence in any reasonable view suggests." Fowler v. State, 779 P.2d 580, 585 (Okla. Crim. App. 1989). In instructing on second-degree murder, the state trial judge followed Oklahoma law as it then existed.

Given the commonly-accepted state of the law, we cannot credit Bibbee's claim of "complete lack of notice [prior to the jury instruction conference] that he would have to defend against the second-degree murder charge." Appellant's Reply Br. at 8. For Bibbee, a charge of first-degree malice murder provided notice of the charge of second-degree depraved-mind murder offense.[4] Therefore, he

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[4] An appellant has the responsibility of providing us with the appropriate record for appeal. Deines v. Vermeer Mfg. Co., 969 F.2d 977, 978 (10th Cir. 1992); Fed. R. App. P. 10(b)(2). We note that the record contains no factual support for a contention that Bibbee was actually unaware of the potential for a second-

was not deprived of his constitutional right to due process of the law.

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

Entered for the Court

David M. Ebel
Circuit Judge

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degree murder charge. At trial, counsel's objection to the giving of a second-degree murder instruction was based solely on the grounds that the evidence did not support it.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed October 21, 1998]

No. CIV-98-378-C

JAMES RICHARD BIBBEE,
Petitioner

v.

H. N. "SONNY" SCOTT,
Respondent

ORDER

This action brought by petitioner, through counsel, seeks a writ of habeas corpus, and challenges his conviction for murder in the second degree entered in the District Court of Garfield County. The matter was referred to United States Magistrate Judge Gary Purcell, consistent with the provisions of 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge entered his Report and Recommendation on September 15, 1998, to which petitioner timely objected. Having been ordered to do so by the Court, the State filed its response, and the Court considers the matter de novo.

The facts as they are relevant to a determination here are accurately set out in the Report and Recommendation of the Magistrate Judge. It is petitioner's contention that, having been charged with first degree murder, the judge's instruction on second degree murder, and the jury's verdict of guilt on that offense, violate his constitutional rights of due process; in other words, he contends he was convicted for an offense of which he was not charged. There is no question but that the evidence supports a conviction for second degree murder. The question, then, is whether the Oklahoma Court of Criminal Appeals' relatively recent pronouncement in Willingham v. State, 947 P.2d 1074 (Okla. Crim. App. 1997), cert. denied, ___ U.S.___, 118 S.Ct. 2329 (1998), that second degree depraved mind murder is not a lesser included offense of first degree malice aforethought murder, requires the result petitioner urges. The State argues that the petitioner presents nothing more than an allegation of error of state law, with no constitutional or federal implications justifying federal habeas consideration. Even assuming federal rights are implicated, if state law permits the jury's consideration of other forms of homicide, no due process fight has been violated. The Court finds that petitioner's conviction of second degree murder is not contrary to state law. Nothing in Willingham or its progeny vitiates the instruction found in Fowler v. State, 779 P.2d 580, 585 (Okla. Crim. App. 1989), cert. denied, 494 U.S. 1060 (1990), that "[t]he trial court is to instruct the jury on every degree of homicide which the evidence in any reasonable view suggests." Willingham and later cases relying on it discuss the necessity of setting aside a conviction on first degree murder when second degree depraved mind murder was not offered as an alternative in the jury instructions. That alone distinguishes those cases.

Under Fowler, and particularly in view of the facts of this case, no error, constitutional or otherwise, can be found.

Accordingly, the Court affirms and adopts the Report and Recommendation of the Magistrate Judge, and for the reasons stated therein, denies this petition for writ of habeas corpus. A judgment will enter.

IT IS SO ORDERED this 21st day of October, 1998.

/s/_____
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed October 21, 1998]

No. CIV-98-378-C

JAMES RICHARD BIBBEE,
Petitioner

v.

H. N. "SONNY" SCOTT,
Respondent

JUDGMENT

Upon consideration of the petition for writ of habeas corpus filed herein, the Report and Recommendation of the Magistrate Judge, as well as petitioner's objections thereto, and the Court's accompanying Order,

IT IS ORDERED, ADJUDGED AND DECREED that the petition for writ of habeas corpus be and the same is hereby denied.

DATED this 21st day of October, 1998.

/s/
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed September 15, 1998]

No. CIV-98-378-C

JAMES RICHARD BIBBEE,
Petitioner

v.

H. N. "SONNY" SCOTT,
Respondent

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing *pro se*, brings this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 challenging the conviction for Murder in the Second Degree entered against him in the District Court of Garfield County, Case No. CF-91-365, on June 4, 1992, for which he is serving a sentence of life imprisonment. Respondent has responded to the Petition and filed the transcript of the trial and sentencing (hereinafter TR __), to which Petitioner has filed a reply. The matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. §636(b)(1)(B). Inasmuch as the matter may be resolved on the basis of the record and the law, and because

Petitioner has not shown a justifiable failure to develop the factual bases of his claims in State court, an evidentiary hearing is not necessary. 28 U.S.C. §2254(e)(2); Townsend v. Sain, 372 U.S. 293, 312 (1963), overruled in part by Keene v. Tamayo-Reyes, 504 U.S. 1 (1992). For the following reasons, it is recommended that the Petition be denied.

Petitioner was charged with First Degree Murder and convicted of Murder in the Second Degree following a jury trial. Petitioner asserted in his direct appeal from the conviction, *inter alia,* that the trial court erred as a matter of state law in instructing the jury on the offense of Murder in the Second Degree and that there was insufficient evidence to support the conviction. Response, Ex. A.[1] The Oklahoma Court of Criminal Appeals ("OCCA") rejected Petitioner's claims and affirmed the conviction in a summary opinion. Response, Ex. C (Bibbee v. State, Case No. F-93-61 (Okla.

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[1] The record shows Petitioner also filed an application for post-conviction relief in the trial court alleging (1) that the trial court erred in finding he waived his remaining two peremptory challenges, (2) that trial counsel provided ineffective assistance by not exercising all of the peremptory challenges to remove undesirable individuals from the jury panel, (3) that trial counsel provided ineffective assistance in allowing the admission of testimony of Petitioner's previous bad acts without objection, and (4) that appellate counsel was ineffective for failing to raise these issues in Petitioner's direct appeal. Response, Exs. D, E. The post-conviction application was denied, and the denial was affirmed on appeal. Response, Exs. D, F. The Oklahoma Court of Criminal Appeals addressed and denied Petitioner's claims of ineffective assistance of trial and appellate counsel on their merits.

Crim. App. Feb. 7, 1995)). Petitioner asserts the same claims in his Petition, contending that because Murder in the Second Degree is not a lesser included offense of Murder in the First Degree under Oklahoma law and because "[t]he facts presented at my trial did not establish the elements of second degree, depraved mind murder" he could not lawfully be convicted of second degree murder. Respondent contends that to the extent Petitioner challenges the jury instructions given at his trial, Petitioner has raised only an issue of state law that is not cognizable in this habeas proceeding. Respondent further contends that to the extent Petitioner alleges the evidence was not sufficient to convict him of second degree murder, the OCCA's opinion in his direct appeal is not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States.

In Beck v. Alabama, 447 U.S. 625, 638 (1980), the Supreme Court concluded that in a capital case, the due process clause requires that a jury be given the option of convicting a defendant on a lesser included noncapital offense if the evidence would support a conviction of that offense. Accord, Hopper v. Evans, 456 U.S. 605, 610 (1982). Thus, under Beck, "[a] trial court must instruct a jury on a noncapital offense as defined by state law only if the evidence would have supported such a verdict." Duvall v. Reynolds, 139 F.3d 768, 786 (10th Cir. 1998), pet. for cert. filed (U.S. July 31, 1998)(No. 98-5487); see Valdez v. State, 900 P.2d 363, 378 (Okla. Crim. App.)(in capital case in Oklahoma, failure to give lesser included offense instructions supported by the evidence is reversible error), cert. denied, 516 U.S. 967(1995); Bennett v. State, 743 P.2d 1096 (Okla. Crim. App. 1987) (same).

Petitioner was not, however, tried on a capital murder charge. The record shows the prosecution did not seek the death penalty in Petitioner's case, and the jury was instructed that it could sentence Petitioner to life imprisonment or life imprisonment without parole if the jury found Petitioner guilty of first degree murder. (TR Vol. IV, at 27). Consequently, Beck is not applicable, and this Court's review of Petitioner's claim of trial error in the giving of jury instructions is limited to a determination whether the alleged jury instruction error "'had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense.'" Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir.) (quoting Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980)), cert. denied, 498 U.S. 961 (1990). Petitioner alleges that it was error for the trial court to give a second degree murder instruction at his trial. Because this alleged error and Petitioner's separate claim of insufficiency of the evidence of second degree murder involve the same facts, and pertinent law, the issues can be resolved simultaneously even though differing standards are applied to the review of the two claims.

Regarding Petitioner's claim of insufficiency of the evidence, Petitioner presents to this Court the same claim resolved on its merits in his direct appeal. As to this claim, habeas relief may be granted only if the state court's "adjudication of the claim-

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

> Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. §2254(d).

The issue concerning whether a conviction is supported by substantial evidence presents a mixed question of law and fact for the Court to review. Maes v. Thomas, 46 F.3d 979, 988 (10th Cir.), cert. denied, 514 U.S. 1115 (1995). The standard for reviewing this constitutional claim is well established. Under Jackson v. Virginia, 443 U.S. 307 (1979), "the relevant question [on habeas review] is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319. Habeas review to determine sufficiency of the evidence is "sharply limited" and a court "faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Messer v. Roberts, 74 F.3d 1009, 1013 (10th Cir. 1996) (quoting Wright v. West, 505 U.S. 277, 296-297 (1992)).

The second degree murder provision in effect at the time of Petitioner's trial, Okla. Stat. tit. 21, §701.8(1991), provided that a homicide is murder in the second degree "when perpetrated by an act imminently dangerous to another

person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual."

> "The elements of second degree depraved mind murder are: 1) death of a human; 2) caused by conduct which was imminently dangerous to another person(s); 3) the conduct was that of the defendant; 4) the conduct evinced a depraved mind in extreme disregard of human life; 5) the conduct is not done with the intention of taking the life of or harming any particular individual."

Valdez, 900 P. 2d at 378. The fifth element has since been modified to read: "The conduct is not done with the intention of taking the life of any particular individual" to clarify that "second degree depraved mind murder may be committed where the victim is specifically targeted." Willingham v. State, 947 P.2d 1074, 1080-1081 (Okla. Crim. App. 1997) (citing Quilliams v. State, 779 P.2d 990, 991 (Okla. Crim. App. 1989), and Dorsey v. State, 739 P.2d 528, 529 (Okla. Crim. App. 1987)), cert. denied sub nom. Thanh Le v. State, 118 S. Ct. 2329 (1998). If the act or conduct is "calculated" to put someone's life in jeopardy and "perpetrated with the full consciousness of the probable consequences," it is second degree murder. Massie v. State, 553 P.2d 186, 191 (Okla. Crim. App. 1976). The act must only be imminently dangerous "to another person" to fall within the second degree murder statute. Quilliams v. State, 779 P.2d at 991.

Although the OCCA recently concluded that "second degree depraved mind murder is not a lesser included offense

of first degree malice murder," Willingham, 947 P.2d at 1081-1082, the appellate court's previous interpretation and its interpretation of state law at the time of Petitioner's trial was that second degree murder was a lesser included offense of first degree murder. See Crumley v. State, 815 P.2d 676, 678 (Okla. Crim. App. 1991). Under this earlier interpretation, a jury "[i]nstruction on lesser offenses [was] only required when there [was] evidence to support the finding of the offense." Id. However, even assuming that the OCCA would find that Willingham must be retrospectively applied to Petitioner's trial, the law is clearly established in Oklahoma that "[t]he trial court is required to instruct the jury on every degree of homicide which the evidence in any reasonable view suggests." Fowler v. State, 779 P.2d 580, 585 (Okla. Crim. App. 1989), cert. denied, 494 U.S. 1060 (1990).

According to Petitioner's testimony at his trial and the testimony of law enforcement officers concerning Petitioner's pretrial statement to the officers, Petitioner "beat [the victim] with his fists. He kicked [the victim] with his boots and he jumped on him." (TR Vol. II, at 175). Petitioner "came down on [the victim] with both knees right in the chest area one time" and kicked the victim "to knock him out." (TR Vol. II, at 176; Vol. III, at 130). Petitioner testified he had been drinking that day and that he usually consumed three to six beers a day. (TR Vol. III, at 118, 119). According to Petitioner, he fought with the victim after the victim made a homosexual advance. (TR Vol. II, at 175; Vol. III, at 127-130). A clinical psychologist testified for Petitioner at trial that Petitioner had described an incident as a teen-ager involving a homosexual assault on him by a stranger. (TR Vol. III, at 51). The psychologist testified that the previous

incident would be "likely to trigger a very quick response" if another similar incident occurred and he described Petitioner as someone who is more likely "to use aggression to settle issues than the average person." (TR Vol. III, at *55,* 57). The evidence presented at trial could reasonably suggest that Petitioner beat the victim and left him beside the road without intending to kill him, but in a manner evincing "a depraved mind in extreme disregard of human life. . . ." Valdez, 900 P.2d at 378. See Response, Ex. A (Appellant's Brief, at 22-24). Hence, the jury instructions given at Petitioner's trial were not so fundamentally unfair as to violate the Constitution and, when viewed in the light most favorable to the prosecution, there was sufficient evidence presented at trial from which a rational jury could have found the essential elements of second degree murder beyond a reasonable doubt. Therefore, the OCCA's decision was consistent with clearly established Supreme Court jurisprudence, and Petitioner is not entitled to habeas relief.

Additionally, for the reasons set forth herein, Petitioner fails to make a substantial showing of the denial of a constitutional right. Accordingly, the 28 U.S.C. §2253 Certificate of Appealability required to appeal the denial of the 28 U.S.C. §2254 Petition for a Writ of Habeas Corpus should be denied.

RECOMMENDATION

In view of the foregoing reasons, the undersigned recommends that the 28 U.S.C. §2254 Petition for a Writ of Habeas Corpus be denied. It is also recommended that a 28 U.S.C. §2253 Certificate of Appealability be denied. The Petitioner is advised of his right to object to this Report and

Recommendation on or before September 30, 1998, in accordance with 28 U.S.C. §636 and LCvR 721. Petitioner is further advised that failure to file a timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 15th day of September, 1998

/s/_____
GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE